Supreme Court, U. S.
FILED
MAY 23 1979
MICHAEL RODAK, JR., CLERK

No. 78-1751

In the

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,

Respondent,

vs.

ROBERT F. McPARTLIN,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM J. HARTE
RICHARD J. PRENDERGAST
111 West Washington Street
Chicago, IL 60602
(312) 726-5015

The Scheffer Press, Inc.—(312) 263-6850

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit rendered in the above entitled case on March 26, 1979.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unpublished. It is set forth in a Joint Appendix filed contemporaneously with this Petition by several co-defendants in this cause.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 26, 1978. A timely petition for rehearing was filed and was denied on April 23, 1979. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provision involved is the Due Process clause of the Fifth Amendment. The statutory provisions include 18 U.S.C. Secs. 371, 1343 and 1952. Pertinent statutory provisions are set forth in Appendix A to this Petition.

QUESTIONS PRESENTED

1. Did the Government's willful failure to fulfill its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), thereby depriving petitioner of a fair trial, violate his constitutional rights to due process under the Fifth Amendment?

2. Where the defenses of the defendants were so antagonistic that belief of one required disbelief of the other, did the trial court's refusal to sever the cases violate petitioner's constitutional right to due process under the Fifth Amendment?

3. Did the trial court's admission of documentary evidence tendered by the Government, together with its exclusion of similar documentary evidence tendered by the defense in apparently contradictory rulings, manifest a double standard in the conduct of the trial and thereby violate petitioner's constitutional right to due process under the Fifth Amendment?

STATEMENT

The indictment in this cause charged petitioner Robert F. McPartlin and others with various violations of 18 U.S.C. §§371, 1343 and 1952. The jury returned a verdict of guilty as to the conspiracy count, and certain of the remaining counts charging violations of §§1343 and 1952. Robert F. McPartlin was sentenced to a total of eight years in prison and fined a total of $40,000.00. On appeal the Seventh Circuit unanimously affirmed the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

1. Brady v. Maryland

Petitioner submits that this case presents this Court with the unusual question of the Government's planned, wilful and admitted withholding of favorable evidence, contrary to an explicit order of the trial court, until the Government's opening statement at the trial. This evidence was such that it required extensive investigation by the defense after disclosure, and could have led to substantial other favorable evidence if disclosed earlier. The excuse of the Court of Appeals, *i.e.*, "the failure of the defendants to pursue adequately any subsequent investigation and their subsequent failure to request additional time for any investigation," has absolutely no foundation in the real world. Petitioner is not a man means, a father of ten children, and had to rely upon friends to raise money for his attorney fees. *Brady* v. *Maryland* does not comtemplate or permit the Government's planned, designed, wilful, admitted secreting of favorable evidence until the actual trial of the cause.

2. Severance

There was no possibility of a fair trial for *all defendants* in this case. The defense of the Ingram defendants (extortion by the "Chicago" defendants) rendered impossible the defense of the so-called "Chicago" defendants. Severance was not requested to obtain a "tactical advantage" or "a better chance of acquittal", as suggested by the Court of Appeals. The defenses were so antagonistic as to preclude fair consideration of petitioner's defense.

3. The Inconsistent Evidentiary Rulings

The trial court admitted evidence proffered by the Government of non-contemporaneous entries in a personal diary of an admitted thief, embezzler and liar, on the

ground that there was a showing of the requisite "trustworthiness". The trial court excluded evidence, proffered by defendants, of an accountant's records and a bank statement because they "lacked sufficient trustworthiness to permit admissibility." These rulings were totally inconsistent applications of the same rule of evidence.

I.

THE GOVERNMENT'S FAILURE TO FULFILL ITS OBLIGATIONS UNDER BRADY v. MARYLAND REQUIRES REVERSAL.

On July 20, 1976, counsel for defendant Frederick Ingram made a formal request that the Government disclose favorable evidence, including specific requests that the Government disgorge any written statements or grand jury testimony of any person claimed to have been a co-conspirator, and any material reflecting that William Benton, the Government's principal witness, benefitted personally or financially as a result of the dealings between the MSD and Ingram Corporation.

The Government flatly refused to deliver any grand jury testimony and replied that it was aware of its responsibility under *Brady* v. *Maryland* and that upon completion of its review, all relevant *Brady* material would be produced. On August 9, 1976, the Government having failed to further respond, defendants Frederick and E. Bronson Ingram filed a motion for production of evidence favorable to the defendants. Robert McPartlin adopted this motion, which requested that the Court order the Government to disclose any information showing:

> "(5) That Benton was fired by any former employer for diverting substantial sums of money to his own personal use.
>
> (6) That Benton arranged to have Ingram Corporation funds, . . . diverted to any person or persons . . . and subsequently diverted to his own use . . . .
>
> (7) That Benton improperly took funds."

The Government responded that it had made available all *documentary* evidence. In an order dated October 22, 1976, Judge Brady held that "defendants are clearly entitled to . . . (1) any evidence favorable to them (including any such material which would also be produceable at trial under §3500) and (2) any material required by Rule 16 of the Federal Rules of Criminal Procedure." Noting that "some of the defendants have apparently attempted to list every conceivable kind of evidence that might or could be favorable to them, without reference to whether there is even a bare possibility that such material exists", the Court ruled as follows:

> "Rather than belabor over each of these individual items, the court is entering an order requiring production of all favorable evidence, regardless of what it is . . . A blanket order of this kind *obviously requires and assumes good faith on the part of the Government.* But this is true regardless of whether the order refers to a general class of evidence or to specific items. *The Court and the defendants must rely upon the representations of the Government in either case.*" (emphasis added).

The Court's order, applicable to all defendants, specifically required that the Government must provide "[a]ll evidence favorable to the defendant, by which is meant evidence which either *by itself or in combination with other evidence* creates or tends to create a reasonable doubt of the defendant's guilt. This includes, *but is not limited to,* documents, tangible objects, statements of witnesses, grand jury testimony, and statements of co-defendants. This portion of the order is intended to ensure compliance with the mandate of *Brady* v. *Maryland.*" (R. Vol. II, 26) (emphasis added)

On September 8, 1977, a full thirteen months after the initial request and eleven months after Judge Grady's order, the Government delivered its opening statement, and disclosed for the first time that Benton had stolen $376,000.00 of the money allegedly given to him by Ingram Corporation for the purpose of bribing the Chicago defendants (Tr. 47-8). Following the opening statement, defense counsel strenuously objected to the Government's failure to disclose this fact at any time prior to trial, despite the Court's unequivocal order and the fact that, as the Government conceded, the information had been known to the Government since prior to Benton's appearance before the grand jury, *roughly two years before trial.* (Tr. 237).

During the arguments which followed, Judge Grady asked: "Are you saying, Mr. Nash, that the documents you have disclosed to the defense already show a $376,000.00 discrepancy on their face?" Mr. Nash responded: "On their face. That is correct." (Tr. 226). As Mr. Neal, representing the Ingrams, responded, "That is just patently not accurate." (Tr. 227) Mr. Neal, who had had access to the Ingram documents, as well as those disclosed by the Government, and who had been involved in a well-financed and thorough effort to prepare the Ingram defense, stated to the Court:

> "I have gone over the documents, and I know that some money disappears, but to say that Mr. Benton—that I know, [based on those documents] that Mr. Benton got that or could prove that Mr. Benton got that is absolutely inaccurate." (Tr. 227)

The following day, Mr. Neal advised the Court that he had worked until two or three o'clock in the morning reviewing "the Benton materials"—"probably three feet thick of materials", and advised the Court as follows:

> "I would say on behalf of the other counsel, it took me months, literally, to trace money available to Benton, money allegedly delivered to Chicago, money otherwise accounted for and money missing. That is about all you can say. *I do not know how anyone of the Chicago counsel really could have traced this money, but that is their problem to show.*" (emphasis added)

Mr. Neal also pointed out that, the previous evening, he had reviewed a document consisting of Benton's grand jury testimony—a document prepared by the Government and read by Benton which contains the statement: "The remaining $337,000.00 which was not distributed is the amount of money I am responsible for keeping." The Court was moved to respond that the Government should have made available the information concerning Benton's theft prior to trial, and that it should not have been left to inference (Tr. 247).

In addition to the obvious fact that the information withheld was highly favorable to the defendants for purposes of impeachment [see, *United States* v. *Esposito*, 423 F.2d 242, 248 (7th Cir. 1975), cert. denied 425 U.S. 916 (1976)], the fact that Benton retained all or a portion of the "bribe money" impacts critically upon the question of whether the Ingram money was distributed to any of the Chicago defendants, and if so, to whom and in what amount. Clearly, the Government was aware that, in denying the receipt of money from Benton, each of the "Chicago" defendants would argue that any funds which the Ingrams claimed to have given to Benton went no farther (Tr. 226).

The Government has an absolute obligation to voluntarily disclose "Brady" material as a matter of due process of law. Thus, even in the absence of a specific request, if the suppressed evidence is such that it "creates

a reasonable doubt that did not otherwise exist, constitutional error has been committed." *United States* v. *Agurs,* 427 U.S. 97, 112 (1976). In any event, once a request is made by the defense for exculpatory material within the Government's control, the argument that no court order was issued specifically requiring disclosure becomes irrelevant. In reference to a specific request by the defense for exculpatory material, the *Agurs* Court held that the Government's failure to respond is "seldom, if ever, excusable." Following *Agurs,* the Seventh Circuit indicated in *United States* v. *Weidman,* ..... F.2d ..... (7th Cir. 1978) (Slip Op. No. 6-1110, March 31, 1978), that where the defense makes a specific request, the applicable standard of materiality is less than that which is required when the request is of a general nature.

It should be noted, as did the Court in *United States* v. *Keough,* 391 F.2d 138, 147 (2d Cir. 1968), that a specific request by the defense serves to give the prosecutor notice of the importance which such evidence has to the defense. Aware of the inequity which non-disclosure would create in such a situation, the *Keough* Court held that a specific request imposes upon the prosecutor a duty to make "a careful check of his files". It is fallacious to argue that once such a careful check is made, exculpatory evidence thus discovered or otherwise known to the Government may be withheld from the defense.

In the context of the case against Robert McPartlin, the failure to disclose the fact that Benton had retained $337,000 of the alleged bribe money was critical. Had this fact been disclosed to the defense, specific requests could have been directed toward more detailed information concerning those funds. For example, if a portion of the $337,000 retained by Benton were determined to have been obtained by him shortly prior to the date on which

he allegedly made a payment to McPartlin, that evidence would have critically impacted upon the defense that Benton kept the funds which he claims to have passed on to this Appellant. It should be noted that defendant Lynam was acquitted, despite Benton's testimony, because Lynam was able to demonstrate that shortly after Benton claimed to have delivered $5,000 to him, Benton's account at a jewelry store was credited in that amount. (Tr. 674-78).

The record is clear that the Government had knowledge of the specific amount of money which Benton claimed to have kept. The record is equally clear that the Government did not obtain its knowledge by perusing a massive array of documents, but rather received its information directly from Benton. It goes without saying that Appellant did not have access to Mr. Benton, as did the Government prior to trial (Tr. 241-242), not that he would have been a very cooperative source of information in any event.

Benton *claimed* to have kept $337,000. No one knows, however, whether he actually kept $500,000 or $700,000 or a million dollars. A thorough investigation into the disposition of those funds which he admittedly retained might have revealed that additional funds were similarly expended, deposited or hidden. But the Government's disclosure in its opening statement as to the amount which *Benton says* he retained came entirely too late to allow for such an investigation.

It is respectfully submitted that the Government's failure to disclose Benton's embezzlement of Ingram Corporation funds until the commencement of the trial, served to achieve essentially the same result as non-disclosure. The belated disclosure precluded any chance of effective investigation, and as a result destroyed the potential to

uncover exculpatory evidence regarding the funds allegedly delivered to McPartlin by Benton.*

The Government's efforts to sidestep its obligation under *Brady* by merely making voluminous records available for examination and copying, when Benton's illicit activities and the amount of money he embezzled had been discovered by the prosecution two years prior to trial, creates a condition not dissimilar to that found in *Jackson* v. *Wainwright,* 390 F.2d 288, 298 (5th Cir. 1968). There, the Court held that the prosecution's partially truthful disclosure actually amounted to an affirmative misrepresentation. Disclosure must occur in sufficient time to enable the defendant to utilize the information effectively. Thus, in *United States* v. *Pollack,* 534 F.2d 964, 973 (D.C. Cir. 1976), the Court held that while *Brady* may be viewed in some contexts as not creating a right to pre-trial discovery, strict application of such a view would inevitably produce situations where the prosecution, by late disclosure, could effectively "emasculate" *Brady.* By delaying disclosure until after trial had commenced, when defense counsel were immersed in the demanding and time-consuming task of litigation, defendants were precluded from conducting an effective follow-up investigation. See *U.S.* v. *Partin,* 320 F.Supp. 275, 285 (G.D. La. 1970). By thus failing to disclose material essential to McPartlin's defense until the trial had actually begun, the Government purposely and blatently attempted to satisfy its duty under *Brady* in a manner calculated to render disclosure void of any real substance.

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* In this connection, it should be noted that defendant Weber's counsel requested "a recess for a reasonable time for additional investigation" (Tr. 249). The request was denied.

It is beyond petitioner's comprehension how any fair person can address the *Brady* issue in this case and agree with the decision of the Court of Appeals. *Brady* v. *Maryland* has been stood on its head; all that remains is the shell. Until this decision, every single prosecutor in every single court, whether state or federal, has been obliged to unhesitatingly reveal Brady material long before trial so as to comply with the true meaning, purpose and spirit of *Brady.*

The Court of Appeals ignored, failed to consider, or gave an inadequate and incomplete response to the following arguments in the briefs filed therein on this issue:

> (a) Defendant had to rely on the "good faith" of the government that it followed the Court order to turn over "favorable evidence regardless of what it is", and planned McPartlin's defense accordingly.
>
> (b) The information withheld was highly favorable to the defendants for purposes of impeachment.
>
> (c) The fact that Benton retained all or a portion of the 'bribe' money impacts critically upon the question of whether the Ingram money was distributed to any of the Chicago defendants, and if so, to whom and in what amount . . . [E]ach of the 'Chicago' defendants would argue that any funds which the Ingrams claimed to have given to Benton went no further.
>
> (d) Nondisclosure "precluded any chance of effective investigation, and as a result destroyed the potential to uncover exculpatory evidence regarding the funds allegedly delivered to McPartlin by Benton." (Appellant's Br., p. 36).

Finally, petitioner calls this Court's attention to the fact that not one word is said in the Seventh Circuit's lengthy opinion about the Government's inability to account for its failure to disclose this information in the face of a court order. Once again, and all too often the concept of fair trial is diluted by a rush for justice in a sensational trial.

The new *Brady* rule measures how long one can withhold information notwithstanding a court order to reveal it long before trial? It must be remembered that the court ordered this material produced long before trial. The Government had the material long before trial. The Government chose not to reveal it until the opening statements. Why? To assist its prosecution? Of course!! Why? Was the delay calculated? Of course!! Why? To make it difficult, if not impossible for defendants to discover helpful material? Of course!! There is no other possible explanation. The Government does not claim mistake, inadvertence or accident. The *Brady* violation was intentional.

This case is not *U.S.* v. *Stone,* 471 F.2d 170 (7th Cir. 1972) or *U.S.* v. *Lomprey,* 472 F.2d 860 (7th Cir. 1972). Comparing those cases to the one at bar is like comparing fleas with elephants. In *Stone,* the defendant claimed that the withheld witnesses would have testified they could not identify him. But both witnesses testified at trial that they could not identify him. In *Lomprey,* another witness identification case, the pretrial exculpatory expressions were delivered to defendant in time for use during trial. In neither case would investigation have revealed anything useful to defendants.

As we labored to state to anyone who would listen, in the Court of Appeals, this case was a complex sensational criminal trial which took the Government with all its re-

sources years to investigate. The trial alone extended two months. The defendant is a man with limited resources, and a wife and a load of children to feed. What possible sense does it make to suggest that *during the trial,* while he and his attorney are present in court all day, every day, he can conduct an investigation of the affairs of the Government's chief witness.

Regardless of whether the failure of the Government to meet its obligations under *Brady* is viewed as an admission that the proper discharge of its duties would have jeopardized the Government's case, or whether the proper administration of our system of justice simply cannot tolerate such actions*, the result is the same—reversal of Petitioner's conviction.

II.

THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT McPARTLIN A SEVERANCE FROM THE INGRAM DEFENDANTS.

Petitioner respectfully submits that, in refusing to sever the trial of the Ingram defendants from that of the remaining defendants, the trial court committed prejudicial error and denied petitioner a fair trial.

It is respectfully submitted that the instant case clearly falls within the parameters established in *United States* v. *Kahn,* 381 F.2d 824 (7th Cir. 1967), and by the Fifth Circuit in *United States* v. *Johnson,* 478 F.2d 1129 (5th Cir. 1973), pursuant to which the trial court should have granted the motions for severance. Just as "Smith was the Government's best witness against Johnson" in the latter case, the Ingrams, the witnesses called on their behalf, and their counsel (both in argument and

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* See, *United States* v. *Gerard,* 491 F.2d 1300, 1302 (9th Cir. 1974).

in the course of cross-examining Benton) seized every opportunity to support and reinforce the Government's claim that the "Chicago" defendants had participated in a scheme and conspiracy to extort money from Ingram Corporation. The extent and effectiveness of this effort is well demonstrated in the record of this case.

That the defenses of the two groups of defendants were so inconsistent as to satisfy the requirements of *United States* v. *Kahn, supra,** is perhaps best demonstrated by the fact that, given the defense advanced by the Ingrams, it would have been impossible, as a practical matter, for all defendants to be acquitted. The Ingrams' defense was that the monies paid by Ingram Corporation were the product of a scheme of extortion so pervasive as to negate the intent necessary to sustain a conviction for bribery. The defense advanced by each of the "Chicago" defendants was not only that they did not receive money from Benton, but that they had never *demanded* such payments. In order for the jury to find Frederick Ingram not guilty, it would have been necessary for the jury to conclude that the coercive and extortionate actions of at least one Chicago defendant were such as to have negated any intent on the part of the Ingrams to commit bribery. To posit any real possibility of a verdict favorable to all defendants, given the Ingram defense, is to operate in a world of make-believe.

More importantly, however, one cannot examine the issue of severance solely in the context of whether, as an academic matter, some possible set of circumstances might conceivably result in a verdict of acquittal for all, thus es-

* At a minimum, *Kahn* requires severance under circumstances in which, "if one defense were believed, the other could not be." 381 F.2d at 841.

tablishing the theoretical possibility that the antagonistic defenses were not wholly inconsistent. Rule 14 of the Federal Rules of Criminal Procedure provides for severance "[i]f it appears that a defendant or the Government is prejudiced by the joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, . . .". That the Chicago defendants were prejudiced by the joinder of the case against them with that against the Ingrams is manifest. The record in this case is replete with the hearsay testimony of Frederick Ingram and others as to what they were told by Benton. That testimony was admitted to establish Ingram's state of mind, and ostensibly was admitted solely for that purpose. The extra-judicial statements of Benton, presented to the jury in this manner, tracked the Government's case against the Chicago defendants in every respect. To argue that the jury could consider this evidence as bearing only upon Ingram's state of mind, as instructed, and disregard it as substantive against the Chicago defendants, is pure folly.

Likewise, the cross-examination of Benton, a sampling of which appears at pages 10 through 13 of the Janicki brief in the court below, demonstrates the extent to which the Ingram attorneys were allowed to lead Benton through the very areas, and elicit testimony regarding the same matters, as had been developed by the Government during direct examination. No doubt, the Government would have been delighted had it been allowed to examine its principal witness through the use of leading and suggestive questions; no doubt the Government was delighted when counsel for the Ingrams, under the guise of cross-examination, did precisely what the Government could not.

In essence, the Chicago defendants were tried twice, once by the Government and once by the Ingrams. That

the Ingrams should have been provided a full opportunity to pursue their defense is beyond dispute. That they should have been able to do so at the expense of the remaining defendants was reversible error. The motions for severance of the Ingram case from that of the remaining defendants should have been granted.

III.

THE INCONSISTENT RULING OF THE COURT ON CRITICAL DOCUMENTARY EVIDENCE PREJUDICED PETITIONER.

The least a defendant should expect in the trial of any cause is consistency, even in erroneous rulings. In this case the court's rulings seem to be poles apart, depending upon who offered the evidence.

The accountant's records reflecting Weber's explanation as to the source of certain one thousand dollar bills should have been allowed in evidence. Rule 803(6) of the Federal Rules of Evidence codifies the business records exception to the hearsay rule and provides that a record kept in the course of a regularly conducted business activity is admissible if made by a person with knowledge, or if made from information transmitted by a person with knowledge, unless the source of information or the method or circumstance of preparation indicate lack of trustworthiness. The circumstances surrounding the preparation of the accountants' records (i.e., the tax appeal) certainly do not indicate a lack of trustworthiness, and since the information was provided by Weber (a person with knowledge) prior to commencement of the grand jury's investigation, it cannot be concluded that the source of the information was untrustworthy at the time the statement was made. Clearly, the record which Weber sought

to introduce in evidence was kept in the course of a regularly conducted business activity, as that term is defined in the last sentence of Rule 803(6). Yet the Trial Court held, in sustaining the Government's objection, that "the ruling is the same as to the written notations on the document. They are obviously not made in the ordinary course of business. They are hearsay. They are self-serving." (Tr. 4944) It is absolutely astounding that the Courts below would hold that the records normally kept by a Certified Public Accountant do not satisfy the requirements of the business records hearsay exception—Rule 803(6)—and yet hold that the Benton diaries were admissible as records of a regularly conducted business activity. In so ruling, the trial court allowed the Government to use Benton's diaries to corroborate his testimony as to what transpired at the April 3, 1971 meeting, and precluded the defendants from introducing evidence calculated to refute Benton's testimony and corroborate that of Appellant Weber.

The Court of Appeals states that the argument that it was error to exclude the testimony of Weber's accountant and the bank statement "creates a paradoxical tension with their arguments that Benton's desk calendars were not business records." The paradoxical tension in this case was not on petitioner's doorstep. We ask only that the Court contrast the treatment of the Rule 803(6) issue in this respect, with the conclusion that the Benton diaries were properly admitted under that Rule. The rulings are wholly inconsistent with one another.

Even more paradoxical is the treatment of both issues by the Court of Appeals. The accountant's testimony and the bank statement are said to be inadmissible because they "lacked sufficient trustworthiness to permit admis-

sibility." (Opinion, p. 49). The Court *must* have found the requisite "trustworthiness" in the diary entries. The requisite "trustworthiness" for these entries was Benton who admittedly doctored the diaries whenever it suited his purpose. Benton is a confessed thief, embezzler and liar. He had in the past been fired for dishonesty and embezzlement, had accepted kickbacks, and has admitted outright the theft of $337,000 from Ingram. This man had the consumate gall to claim that $230,000 of that sum was stolen from his closet.

We accept the fact that the Government must take its immunized embezzler and thief with all his limitations in character, but for the Court of Appeals to label him and his diaries, and the way they were entered, as supplying the requisite "trustworthiness", while holding that the accountant's testimony and the bank statements are said to lack sufficient trustworthiness, is difficult to get down. What is sauce for the goose, ought to be sauce for the gander.

CONCLUSION

For the reasons set out above, Petitioner respectfully submits that this petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM J. HARTE
RICHARD J. PRENDERGAST
111 West Washington Street
Chicago, IL 60602
(312) 726-5015

APPENDIX A

STATUTORY PROVISIONS INVOLVED

Title 18, U.S.C., §371.

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18, U.S.C., §1343

Fraud by wire, radio, or television

Whoever, having devised or intending to device any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communcation in inter-state or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

Title 18, U.S.C., §1952

Inter-state and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in inter-state or foreign commerce or uses any facility in inter-state or foreign commerce, including the mail, with intent to — (3)

promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in sub-paragraph [s] . . . (3), shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

(b) As used in this Section "unlawful activity" means . . . (2) . . . bribery . . . in violation of the laws of the State in which committed or of the United States.

Supreme Court, U. S.
FILED
JUL 14 1979
MICHAEL RODAK, JR., CLERK

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

FRANK J. MARINE
Attorney
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1751
ROBERT F. MCPARTLIN, PETITIONER
v.
UNITED STATES OF AMERICA

No. 78-1754
EDWIN T. BULL, PETITIONER
v.
UNITED STATES OF AMERICA

No. 78-1755
VALENTINE JANICKI, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-77) is reported at 595 F. 2d 1321.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1979. Petitions for rehearing were denied on April 23, 1979 (Pet. App. 78-79). The petitions for a writ of certiorari were filed on May 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying petitioners' motions for a severance.

2. Whether disclosure of the pretrial statements of a government witness at the commencement of trial deprived petitioners of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of violating the Travel Act, 18 U.S.C. 1952, and the Wire, Radio, Television Fraud Act, 18 U.S.C. 1343, and of conspiring to violate those provisions, in violation of 18 U.S.C. 371.[1] Petitioner McPartlin was sentenced to a total of eight years' imprisonment and fines totalling $40,000. Petitioner Bull was sentenced to three years' imprisonment and fines of $20,000. Petitioner Janicki was sentenced to ten years' imprisonment and fines of $80,000.

The evidence presented at trial, which is summarized by the court of appeals (Pet. App. 2-13), showed that co-defendant Frederick B. Ingram, chairman of the board of directors of a corporation based in Louisiana (Ingram Corporation), paid petitioners McPartlin and Janicki and certain other persons more than $900,000 in bribes to obtain a multi-million dollar sludge-hauling contract from the Chicago Metropolitan Sanitary District. Petitioner Janicki was a trustee of the sanitary district. Petitioner McPartlin was an Illinois legislator. Petitioner Bull, president of an Illinois towing company, served as an intermediary through whom some of the illegal payments

[1]Petitioner Janicki was also convicted on two counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1).

were made. William J. Benton, an unindicted co-conspirator, was vice-president of Ingram Corporation. Benton made the illegal payments to the Illinois officials on behalf of Ingram Corporation.

ARGUMENT

1. Petitioners contend that they were deprived of a fair trial because the district court refused to sever their case from that of the Louisiana defendants (Janicki Pet. 17-22; Bull Pet. 6-11; McPartlin Pet. 13-16). They argue that the defense of the Louisiana defendants (that bribery funds were paid to protect Ingram Corporation's business) was inconsistent with their own defense (that no bribes were demanded or received). They further contend that certain evidence was admitted against them that would have been excluded if a severance had been granted.[2]

These claims are without merit. It is well established that the trial court has broad discretion to grant or deny a severance, and its decision will not be reversed unless the court clearly abused that discretion. See, *e.g.*, *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Tanner*, 471 F. 2d 128, 137 (7th Cir.), cert. denied, 409

[2]Bull (Pet. 8-9) and Janicki (Pet. 6) also argue that their cross-examination of one of the government's witnesses was unduly restricted. But the district court merely gave a general admonition against repetitious cross-examination. Moreover, the witness in question was cross-examined extensively concerning his retention of the bribery funds. Thus, as the court of appeals noted (Pet. App. 17), petitioners have wholly failed to "show any prejudice resulting from the admonition or point to any specific ruling curtailing this cross-examination. It was, moreover, entirely proper for the judge to attempt to forestall repetition." See Fed. R. Evid. 611; *United States* v. *Mandell*, 525 F. 2d 671, 679 (7th Cir. 1975), cert. denied, 423 U.S. 1049 (1976); *United States* v. *Jorgenson*, 451 F. 2d 516, 520 (10th Cir. 1971), cert. denied, 405 U.S. 922 (1972).

U.S. 949 (1972); *United States* v. *Finkelstein*, 526 F. 2d 517, 523 (2d Cir. 1975), cert. denied, 425 U.S. 960 (1976). Moreover, the defendant has the burden of clearly establishing substantial prejudice. See Fed. R. Crim. P. 14; *United States* v. *Di Giovanni*, 544 F. 2d 642, 644 (2d Cir. 1976); *Tillman* v. *United States*, 406 F. 2d 930, 935 (5th Cir.), cert. denied, 395 U.S. 830 (1969).

As the court of appeals noted (Pet. App. 14-16), antagonistic defenses do not necessarily require a severance. The jury may rationally accept one defense and reject the other, depending on the facts in evidence. See, *e.g.*, *United States* v. *Bolden*, 514 F. 2d 1301, 1310 (D.C. Cir. 1975); *United States* v. *Joyce*, 499 F. 2d 9, 21 (7th Cir.), cert. denied, 419 U.S. 1031 (1974); *United States* v. *Hutul*, 416 F. 2d 607, 620-621 (7th Cir. 1969), cert. denied, 396 U.S. 1007 (1970); *Dauer* v. *United States*, 189 F. 2d 343, 344 (10th Cir.), cert. denied, 342 U.S. 898 (1951). To the extent a severance is ever required it should only be when defenses are mutually exclusive to the point that a fair resolution of guilt or innocence is precluded. This may result when one defendant directly incriminates another and there is a substantial danger "that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *Rhone* v. *United States*, 365 F. 2d 980, 981 (D.C. Cir. 1966). See also *De Luna* v. *United States*, 308 F. 2d 140 (5th Cir. 1962).

Here, as the court of appeals properly found, petitioners' defenses did not directly attribute guilt to one another. The degree of inconsistency in theories was not such that the jury would infer that all defendants were guilty on that basis alone. And, as pointed out by the court of appeals, the logical basis of the defenses was not necessarily at variance (Pet. App. 14-15):

> The Ingrams contended that the payments were made only because the Sanitary District threatened to take action that would have resulted in financial disaster to Ingram Corporation, and therefore neither of them had the [requisite criminal intent to bribe] * * *. It was not necessary to this defense that [petitioners] were guilty of extortion or received bribes, because it was possible that Benton, through whom the corporation's communications with, and payments to, [petitioners] were carried out, did not pass any of the money on but kept it all himself.[3]

Under these circumstances, and in consideration of the length of these protracted proceedings, the district court was within its discretion in denying a severance. See, *e.g.*, *United States* v. *DiGiovanni*, *supra*, 544 F. 2d at 644-645; *United States* v. *Bolden*, *supra*, 514 F. 2d at 1310; *United States* v. *Kahn*, 381 F. 2d 824, 840-841 (7th Cir.), cert. denied, 389 U.S. 1015 (1967).

Petitioners' related contention that they were prejudiced by evidence that would not have been admissible at a separate trial is also groundless. Ingram's testimony about the payments that he authorized Benton to make to petitioners on behalf of Ingram Corporation clearly would have been admissible at a separate trial . Moreover, the district court carefully instructed the jury that rebuttal evidence showing that Ingram had paid bribes to foreign

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[3]It is also significant that petitioners and the Louisiana defendants shared a common defense of attempting to shift blame to Benton. Since Frederick Ingram did not communicate directly with petitioners concerning the bribes, Ingram's defense of economic extortion was based entirely on what he claimed Benton had told him about the demand for bribes. Petitioners' defense was based largely on the claim that Benton kept the bribe money for himself and never made any payments to them.

officials was to be considered only as to Ingram's state of mind. The court emphasized that "this evidence relates solely to the defendant Frederic B. Ingram and to no other defendant and is to be considered by you only in connection with Mr. Frederic B. Ingram and no other defendants" (Tr. 5637-5640). Since the rebuttal evidence was not confusing and did not in any way implicate petitioners, there was no danger that the jury would be unable to consider the evidence separately or follow the court's limiting instruction (Pet. App. 17). See also *United States* v. *Toliver*, 541 F. 2d 958, 962-963 (2d Cir. 1976).

2. Petitioners further contend (Bull Pet. 11-13; Janicki Pet. 10-17; McPartlin Pet. 4-13) that the government's disclosure at the beginning of trial that William Benton kept $375,000 of the bribe money violated the government's obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963). This contention is also insubstantial.

The government's delayed disclosure resulted from a reasonable misunderstanding of the scope of the district court's pretrial discovery order. That misunderstanding does not evince a deliberate attempt by the government to gain a tactical advantage.[4]

Moreover, as noted by the court of appeals (Pet. App. 43), full disclosure of Benton's actions was made at the beginning of the trial. This case therefore does not involve a violation of *Brady*, which considered only the question

[4]The prosecutor explained to the district court that since the court had previously denied petitioners' request for pretrial discovery of evidence that " 'Benton improperly took funds and property from Ingram Corporation * * *,' " he did not consider such evidence within the court's general disclosure order (Tr. 221-223). The district court stated that it understood how the misunderstanding arose, adding that it had intended to deny pretrial disclosure only of thefts of "funds unrelated to this case" (Tr. 223-224).

whether suppression of exculpatory material until after trial requires a new trial. *Brady* did not hold that the government must make pretrial disclosure of exculpatory statements, and this Court has subsequently indicated that pretrial disclosure is not constitutionally required. *United States* v. *Agurs*, 427 U.S. 97, 112 n.20 (1976). Moreover, the Jencks Act, 18 U.S.C. 3500, requires disclosure of such statements only after a witness has testified at trial. See, *e.g.*, *United States* v. *Dotson*, 546 F. 2d 1151, 1152-1153 (5th Cir. 1977); *United States* v. *Scott*, 524 F. 2d 465, 467-468 (5th Cir. 1975); *United States* v. *Lomprez*, 472 F. 2d 860, 864 (7th Cir. 1972), cert. denied, 411 U.S. 965 (1973); *United States* v. *Harris*, 409 F. 2d 77, 80-81 (4th Cir.), cert. denied, 396 U.S. 965 (1969); see also *United States* v. *DeLeo*, 422 F. 2d 487, 498-499 (1st Cir.), cert. denied, 397 U.S. 1037 (1970). It is undisputed that the government fully complied with the Jencks Act in this case.

Relying on decisions stating that a new trial may be required when late disclosure of exculpatory evidence prevents the defendant from receiving a fair trial,[5] petitioner Janicki contends that there is a conflict among the circuits concerning the appropriate standard for reviewing cases involving delayed disclosure (Pet. 11-12). However, the Seventh Circuit applied the standard adopted in the cases cited by petitioner Janicki inquiring whether the delay resulted in unfairness (Pet. App. 44-45). Thus, although there may be a difference in the approach of the courts of appeals, that difference could not have affected the result here, since petitioners wholly failed to

[5]See, *e.g.*, *United States* v. *Kaplan*, 554 F. 2d 577, 580 (3d Cir. 1977); *United States* v. *Pollack*, 534 F. 2d 964, 973-974 (D.C. Cir.), cert. denied, 429 U.S. 924 (1976); *United States* v. *Miller*, 529 F. 2d 1125, 1128-1129 (9th Cir.), cert. denied, 426 U.S. 924 (1976).

demonstrate unfairness or prejudice even under the standard most favorable to them (*ibid.*).

The record clearly contradicts petitioners' claim that they were prejudiced because they had inadequate opportunity to investigate the extent of Benton's peculations from the bribery fund. Although the government did not disclose before trial Benton's explicit admission that he had embezzled $375,000, the government previously disclosed Benton's and Ingram Corporation's financial records, from which petitioners could have discerned Benton's misappropriations (Tr. 236-240). The record also shows that seven months prior to trial the defense team was fully aware that Benton stole some of the bribe money. Thus a co-defendant's counsel stated in court (Feb. 2, 1977 Tr. at 19):

> Your Honor, a theory of the defense, for one or more of the defendants, I understand, will be that no money was paid to any official in Chicago.
>
> We want to show that over a period of a number of years, Mr. Benton has developed schemes to steal money from his employer and secrete it overseas.[6]

Under these circumstances, petitioners' claim of surprise and inability to investigate Benton's actions is wholly untenable.

Significantly, the government's disclosure came at the beginning of a nine-week trial. Petitioners therefore had ample opportunity to investigate further Benton's theft

[6]Furthermore, when the government disclosed at trial the specific amount that Benton stole, a co-defendant's counsel stated (Tr. 227): "We suspected it. There is no question about it. That is the reason I am not prepared to stand up here and argue to the Court that I can prove prejudice."

before the trial ended.[7] Nor were the facts surrounding Benton's misappropriations withheld from the jury. The prosecution inquired into Benton's misappropriations (Tr. 1386-1395). Each of the defendants also had the opportunity to examine Benton about the funds that were misappropriated (Tr. 1486-1748). At no time did Benton deny receiving those funds (Tr. 1494-1495). In these circumstances, it is difficult to imagine that pretrial disclosure of the disputed evidence would have added to the effectiveness of the inquiry into Benton's actions.

Finally, we note that the district court denied petitioners' motions for a continuance because it found no prejudice from the delayed disclosure. The court nevertheless stated that it would reconsider such motions if evidence of prejudice was presented (Tr. 248-250). Petitioners did not renew their motions or supplement their presentation. Thus, "the failure of the defendants to pursue adequately any subsequent investigation and their subsequent failure to request additional time for any investigation thoroughly discredits their assertion that they were prejudiced by the timing of the disclosure" (Pet. App. 45). See also *United States* v. *Miller*, 529 F. 2d 1125, 1128-1129 (9th Cir.), cert. denied, 426 U.S. 924 (1976); *United States* v. *Scott*, 524 F. 2d 465, 468 (5th Cir. 1975); *United States* v. *Baxter*, 492 F. 2d 150, 174 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974).[8]

[7]Petitioners were free, of course, to use investigators for this purpose while their attorneys participated in the trial.

[8]Petitioner McPartlin also argues (Pet. 16-18) that the district court erred in making certain evidentiary rulings. Those claims are sufficiently answered by the opinion of the court of appeals (Pet. App. 45-58), on which we rely.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

FRANK J. MARINE
Attorney

JULY 1979

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